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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 115

LUCKENBACH TERMINALS, INC.,
Appellant,

vs.

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY.

APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

NICHOLAS S. SCHLOEDER,
Counsel for Appellee, Township of North Bergen.

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Appellant,

vs.

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY, NEW JERSEY JUNCTION RAILROAD COMPANY, A CORPORATION OF NEW JERSEY, THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION, AND COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY,

Appellees.

STATEMENT AGAINST THE JURISDICTION OF THE COURT, INCLUDING THEREIN MOTION TO DISMISS OR AFFIRM, BY THE APPELLEE TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON AND STATE OF NEW JERSEY.

Pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the appellee hereby makes a statement against the jurisdiction of this court and includes therein a motion to dismiss or affirm.

Statement of the Case.

Practically all the facts which are necessary to determine the questions here involved are contained in the opinions of the court below, which opinions are annexed to appellant's statement in support of jurisdiction as Appendices A, B and C respectively.

The clearest statement of the facts is contained in the opinion filed in the original suit in the New Jersey Supreme Court, 118 N. J. L. 346, 192 Atl. 740. (Appellant's Appendix C.)

The appellee will therefore rest content with these as to the facts, with a single exception—that it denies that there was any admission of certain allegations as set out on page 6 of the typewritten statement of the appellant which reads as follows:

> "* * * on July 5, 1933, a resolution in writing was adopted by three of the Commissioners apportioning the unpaid taxes upon the Riparian Tract so that the southerly three-fifths part thereof carried a valuation of $9,000.00 per year and the northerly two-fifths part thereof a valuation of $496,000.00 per year, instead of $303,000 per year to the southerly three-fifths part and $202,000.00 per year to the northerly two-fifths part (R. 42, 43; Admitted R. 104, Ex. G)."

This is a gross misstatement and has been determined to be without substance by all three tribunals who passed on the question.

Briefly, the facts concerning this are as follows:

The property in question is a narrow strip of water front property in the New York Harbor in the westerly New Jersey side of the Hudson River 1010 feet in length and averaging only a few feet in depth throughout most of the length, only the northerly part terminating in docks having any substantial depth.

This is amply shown on the numerous sketches. In fact, it contained only about 6/10 of an acre.

Now, as upland it was worth approximately $9,000.00 at the rate of $16,000.00 an acre. But by virtue of certain valuable riparian rights, which went with the ownership of the ripa, the taxpayer had a right upon due payment to the State of New Jersey to fill in some twenty acres of land in front of the ripa. This right was valued at the rate of about $500.00 a front foot, or roughly, $500,000.00.

By the settled law of the State of New Jersey, this right was not assessed separately, but as a part of the assessment on the ripa.

Thus,

> " 'If, on the other hand, the defendants have only a right in the land under water as appurtenant to the land back of the exterior line for solid filling, the value of that right is properly included in an assessment upon the land back of the line.' This ruling has been approved by the Court of Errors and Appeals. 75 Id. 571."
>
> *Long Dock Co.* v. *Board of Equalization*, 87 N. J. L. 22, 23 93 Atl. 111.

As a result of a public improvement undertaken by the County of Hudson, leading to the shifting of a public road and some railroad tracks, the appellant property owner conveyed an easement in the southerly three-fifths of the land but retained all of the valuable riparian rights therein constituting approximately 98% of the easement. See especially Complainant's Exhibit C-2, R. 248.

By the simple device of ignoring the fact that this valuable right remained entirely unaffected as a result of sundry conveyances, the appellant makes the false and specious argument that the three-fifths southerly part so lost was apportioned at $9,000.00, while the remaining two-fifths was saddled with the balance of $496,000.00. Actually, the

$496,000.00 represents the value of the ripa right retained.

Appellee's Appendix A is a copy of the testimony establishing how the assessor arrived at his assessment (R. 234), which testimony remained entirely uncontradicted.

The appellant taxpayer unsuccessfully attacked this apportionment both at law and at equity in the State courts. He did not at any time seek the remedy of reapportionment provided by the statute which he now attacks, as will be more specifically pointed out in the argument.

The appellee likewise desires to call attention to the fact that no taxes have been paid on this parcel of property since 1930 (Appellee's Appendix B, R. 189, 190), and that since this case has been decided the Township of North Bergen has instituted foreclosure proceedings against the appellant on February 24th, 1940, alleging taxes unpaid amounting to $376,177.77 on the premises in question; that thereafter on April 8th, 1940, a motion was made to strike out the answer filed by the said appellant, which, it is respectfully submitted, precipitated the appeal to the United States Supreme Court, which appeal is thus manifestly taken for delay only.

ARGUMENT.

Summary of the Argument.

POINT A. The judgment of the State court is based upon (1) laches and estoppel, (2) want of jurisdiction of the Court of Chancery, and (3) failure to prove fraud, a question of fact, all of which do not present a Federal question and are broad enough to sustain the judgment without reference to the Federal question.

POINT B. The admitted failure of the appellant to ask for the administrative remedy afforded by the State statute is alone sufficient to estop it from attacking the constitutionality of such statute.

POINT C. The requirements of the due process clause of the Fourteenth Amendment were amply satisfied in the instant case because (1) the objection is merely addressed to want of notice of the making of an apportionment of a tax levy, although the statute mandatorily provides for reapportionment on notice upon the request of the taxpayer and (2) in the proceedings challenging the apportionment the taxpayer has been given full opportunity to be heard on the question of the validity of the apportionment.

POINT D. It is manifest that the appeal was taken for delay only.

Point A.

The judgment of the State court is based upon (1) Laches and Estoppel, (2) Want of Jurisdiction of the Court of Chancery, and (3) Failure to Prove Fraud, a question of fact, all of which do not present a Federal question and are broad enough to sustain the judgment without reference to the Federal question.

The three opinions of the State courts, both at law and at equity, amply show that the judgment below was based on laches, want of jurisdiction and failure to prove fraud.

(1) The Court of Chancery says:

> "The Supreme Court on the same facts expressed the view that the complainant was in grave laches. • • • Complainant's failure to prove fraud or 'corrupt design' and its laches in seeking relief compels a dismissal of the bill. This being so it is not necessary to pass upon the constitutionality of the act."

These findings are affirmed by the highest court in the State. These grounds are broad enough to support the judgment of the State court, and, curiously enough, in the instant case, the State court says so itself.

Under the circumstances, the question of laches and estoppel presents no Federal question.

Thus, in *Preston* v. *City of Chicago*, 226 U. S. 447, at page 450 remarks,

> "Even, however, if we were at liberty to disregard the action of the state court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question. *Moran* v. *Horsky*, 178 U. S. 205, 207."

(2) The question of jurisdiction between the courts of law and equity in New Jersey does not present a Federal question and is conclusive as far as the Supreme Court is concerned. Thus, the court in *Smith* v. *Adsit*, 83 U. S. (16 Wallace) 185, says:

> "As we have seen, the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here."

(3) Finally, the question of fraud and fairness of the apportionment are all questions of fact, which are not subject to review here. Thus, in *Water-Pierce Oil Company* v. *Texas*, 212 U. S. 86, at page 97, the court remarks:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the

findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quinby* v. *Boyd*, 128 U. S. 488; *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Thayer* v. *Spratt*, 189 U. S. 346."

Point B.

The admitted failure of the appellant to ask for administrative remedy afforded by the State statute is alone sufficient to estop it from attacking the constitutionality of such statute.

As before indicated, the taxpayer wholly failed to take advantage of the administrative remedy afforded by Sections 6 and 7 of the statute under attack.

> Sec. 6. Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality (P. L. 1919, p. 286).
>
> Sec. 7. Notice under the foregoing section shall state the time and place of hearing on such application, and shall be given at least one week in advance by publication in a newspaper in which ordinances of said municipality may be published, and by personal service of a copy of such notice on each person interested who resides in the municipality (P. L. 1919, p. 286).

By reason thereof, the appellant is now estopped from attacking the constitutionality of such statute. This rule is clearly set out in the syllabuses to the following cases.

> "As construed by the Supreme Court of Colorado, §§ 300 and 328 of the charter of the City and County of Denver gave property owners an opportunity to be

heard before the Board of Supervisors respecting the justice and validity of local assessments for public improvements proposed by the Park Commission, and empowered the board itself to determine such complaints before the assessments were made. P. 9.

"Parties who did not avail themselves of such opportunity can not be heard to complain of such assessments as unconstitutional. P. 11. 64 Colorado, 3, affirmed."

Farncomb v. *Denver*, 252 U. S. 7.

Again,

"1. A state taxing statute which, although not providing for notice and hearing before the assessment of property by a board of assessors, grants the taxpayer after due notice the right to a hearing before arbitrators, to be selected one by himself, one by the board, and a third by these two, who shall finally assess and fix the valuation of his property, affords him the notice and hearing required by due process of law; and a taxpayer who, being duly notified of the board's assessment, abstains from demanding an arbitration, so that under the statute the assessment becomes final, has no ground for attacking the assessment as unconstitutional. P. 236."

McGregor v. *Hogan*, 263 U. S. 234.

Point C.

The requirements of the due process clause of the Fourteenth Amendment were amply satisfied in the instant case because (1) the objection is merely addressed to want of notice of the making of an apportionment of a tax levy, although the statute mandatorily provides for reapportionment on notice upon the request of the taxpayer, and (2) in the proceedings challenging the apportionment the taxpayer has been given full opportunity to be heard on the question of the validity of the apportionment.

For clarity, I will again repeat the pertinent Section 6 of the statute.

Sec. 6. Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality (P. L. 1919, p. 286).

(1) It is elementary that, if the taxpayer is afforded some hearing before the administrative action is final, at some stage in the proceedings, the requirements of notice as afforded by the "due process" clause have been complied with. *Pittsburgh* v. *Board of Public Works*, 172 U. S. 32; *Weyerhaueser* v. *Minnesota*, 176 U. S. 550; *Security Trust Company* v. *Lexington*, 203 U. S. 323; *Utley* v. *City of St. Petersburg*, 292 U. S. 106.

This applies to general taxes as well as assessments for benefits. Thus, the court in *Pittsburgh* v. *Board of Public Works, supra*, at page 45 said:

> "But it is not important, in this case, to pursue that course of inquiry; since, in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assessment, at some stage of the proceedings. *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421.
>
> "Even if, therefore, no previous notice of the hearing before the board of public works was required by the statute, or was in fact given to this plaintiff, (which is by no means clear), yet the notice of its decision, with the right to appeal therefrom to the circuit court of the county, and there to be heard and to offer evidence, before the valuation of its property for taxation was finally fixed, afforded the plaintiff all the notice to which it was entitled."

In *Weyerhaeuser* v. *Minnesota, supra,* at page 557, the court said:

> "This court in *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, quoted the above extract as establishing that the property owner was afforded a hearing by the laws of the State, and declared the rule that the Constitution of the United States was satisfied if an opportunity be given to question the validity or amount of the tax 'either before that amount is determined or in subsequent proceedings for its collection.' "

(2) A further and additional reason for sustaining the action here is that the taxpayer was afforded a full and complete hearing upon the merits in the Supreme Court. This fact is clearly pointed out in the opinion of the New Jersey Court of Errors and Appeals.

Referring to the action in the New Jersey Supreme Court, the Court of Errors and Appeals says:

> "The denial of the application for the writ was not grounded in the hypothesis that it was not an appropriate and available remedy under the circumstances presented, but rather that on the merits appellant was not entitled to relief."

Under the circumstances the following remarks of the Supreme Court of the United States in *Security Trust Company* v. *Lexington, supra,* at page 335, are particularly apposite:

> "We think it sufficiently appears that the plaintiff had an opportunity to be heard upon the question of the validity of the tax, both for want of notice in fact, and whether the property assessed for back taxes had really been omitted from the original list for the years in question, and was therefore properly taxable under the assessment for back taxes. Even if the assessment had been made by the assessor without notice, yet if upon the hearing in this cause the plaintiff had the

right and an opportunity to be heard, and the assessment was thereon reduced, it has obtained all the hearing it was entitled to. We think the plaintiff did have such a hearing, and the judgment is correct, so far at least as this court is authorized to review it. It is therefore Affirmed."

Such cases as *Southern Railroad Company* v. *Virginia*, 290 U. S. 190, and *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, are distinguishable. In the first case, the right to apply for a hearing on the administrative action therein taken was granted only as a matter of favor or discretion. The same was true in the second case, with the added element that the notice itself was merely casual.

In the instant case, on the other hand, the statutory right to get a reapportionment on notice, while it is entirely discretionary with the taxpayer, once he exercises that discretion, it is absolutely mandatory as far as the taxing power is concerned. In fact, it places the risk of loss solely upon the taxing power, when it uses the following language:

> "6. • • • on such reapportionment, if a sum is apportioned to any subdivision in excess of the former apportionment, the amount of such excess shall be abated and lost to the municipality."

Point D.

It is manifest that the appeal was taken for delay only.

Subsequent to the decision of the highest State court, there was a proceeding instituted in the Court of Chancery of New Jersey by the Township of North Bergen to foreclose the right of the appellant in the property in question alleging that the sum of $376,177.77 was the amount of the tax lien due on said properties.

On April 8th a motion was made to strike out the answer of the appellant filed in the said cause.

On April 11th a petition of appeal was made in the Supreme Court of the United States.

It is manifest that the sole purpose of such appeal is delay.

Conclusion.

For the foregoing reasons, the following motion is respectfully submitted for the consideration of the court:

Motion to Dismiss or to Affirm.

Comes now the appellee, Township of North Bergen in the County of Hudson, by its counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the highest court of the State, in which the decision in the suit could be had; to wit, the New Jersey Court of Errors and Appeals.

And the said appellee, by counsel as aforesaid, also moves the court to affirm the said judgment or decree from which said appeal purports to have been taken, because although the record in the said cause may show that this Court has jurisdiction in the premises, yet the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and it is manifest that appeal was taken for delay only.

NICHOLAS S. SCHLOEDER,
Attorney and of Counsel for
Appellee Township of North Bergen.

APPENDIX "A".

ADOLPH BENTZ, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Schloeder:

Q. What is your position, Mr. Bentz? A. Tax Assessor of the Township of North Bergen.

Q. How long have you been such? A. Six years.

Q. Are you familiar with the values of property down there? A. I am, sir.

Q. As part of your duties, have you assessed this property in question? A. I have.

The Court: Tax Assessor of what?

Mr. Schloeder: The Township of North Bergen.

The Witness: The Township of North Bergen.

Q. Did you assess the property known as 438-c, 4-a, prior to this apportionment? A. Yes, sir.

Q. What was the assessment, do you recall? A. As much as I recall, it was assessed at $750,000, and subsequent to that, the State Board of Taxation reduced it to $500,000.

Q. And as the result of the State Board of Taxation decision, did you again assess the property? A. I did.

Q. At what figure? A. At the decision rendered by the Board.

Q. In assessing that property, could you give us a brief analysis of the amount allocated to the ripa rights and the amount allocated to the land as land?

Mr. Kelsey: I object to it unless his records show it,—and they do not show it.

The Court: I will allow him to answer it.

A. The land value was approximately——

Mr. Kelsey: I object. He is not an expert.

The Court: He did the actual assessing.

Mr. Schloeder: He has testified hundreds of times in court.

Mr. Kelsey: It may have been away back in 1890 that he assessed it, from all that appears here.

The Court: Do you want to cross-examine him?
Mr. Schloeder: He has testified scores of times.
Mr. Kelsey: I object to the witness' testimony.
The Court: I will allow him to answer the question.

A. The land value, approximately $16,000 an acre, and the balance was on the ripa rights.
Q. How much is the balance? A. $496,000.
Q. So that it is divided into the allodial part of land worth $16,000 an acre and $496,000 for the ripa rights; is that right? A. That is the allocation.
Q. How much, then, did you figure for the land? A. Previous to the apportionment?
Q. No. According to this $16,000 an acre you gave us, how much did you figure for the land? A. $9,000.
Q. $9,000. That made a total of what? A. $505,000.

Mr. Schloeder: That is all.

R. 234, 236.

APPENDIX "B".

Cross examination by Mr. Schloeder:

Q. Was that 1930 tax ever paid? A. I think it was.

Mr. Kelsey: We admit that it was not paid.

A. No.
Q. Were there ever any taxes paid since 1930 on these properties? A. Not on this parcel, no sir.
Q. Nothing? A. No.

Re-direct examination by Mr. Kelsey:

Q. But the year 1930 was paid on some of the other plots. A. On 435-c, lot 7, there was a payment made in 1930.

Re-cross examination by Mr. Schloeder:

Q. Is that the last payment? A. November 19th, 1931, there was a payment made, and the Township waived interest on the payment by resolution of November 16th, 1931. Paid it without interest.

Q. That is on 435. A. Only a partial payment, too.
Q. Is that the last money you ever got from this company? A. Yes, sir.

By Mr. Kelsey:

Q. They paid something over $20,000 at that time, didn't they, Mr. Purdy? A. No, sir, not on those parcels. There was $943.66 interest waived on that payment.
Q. How much was paid? A. $1,056.34.
Q. Is that all that was paid on the 1930 taxes? A. That was all that was paid on the 1930 taxes.

Mr. Kelsey: That is all.

(Witness excused.)

R. 189, 190.